UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

United Nurses & Allied Professionals, (Kent Hospital),

Respondent,

and

Jeanette Geary, an Individual,

Charging Party.

Case No. 1-CB-11135

MOTION TO VACATE VOID DECISION AND FOR CONSIDERATION OF EXCEPTIONS AB INITIO

Jeanette Geary hereby files this Motion to Vacate Void Decision and for Consideration of Exceptions *Ab Initio*.

I. Introduction

This Motion is filed in light of recent unprecedented events involving President Obama's purported recess appointments to the Board, and the pending constitutional challenges to those appointments. On January 4, 2012, President Obama made so-called "recess appointments" to the Board. Three federal appellate courts have ruled that those appointments were invalid. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013) (No. 12-1281); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. May 16, 2013); *NLRB v. Enter. Leasing Co. SE., LLC*,

2013 WL 3722388 (4th Cir. July 17, 2013). On or about July 30, 2013, the Senate confirmed five Members, replacing the disputed recess appointees.

In the midst of these political wranglings, part of Ms. Geary's case was decided by the challenged Board that included two recess appointees, but no final order was issued because that Board severed another portion of her case for further consideration. *United Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (Dec. 12, 2012). Ms. Geary now moves for that invalid decision to be voided and vacated, and for her exceptions to be considered *ab initio* by the now-valid Board.

II. Procedural History and Argument in Support

This case was first decided by Administrative Law Judge Joel Biblowitz on March 30, 2011. On April 27, 2011, Ms. Geary filed exceptions with the Board. While those exceptions were pending, on January 4, 2012, President Obama made the disputed recess appointments. On January 30, 2012, Geary moved to disqualify Members Block and Griffin on the basis that their "recess" appointments were constitutionally invalid. On December 12, 2012, a four-Member Board, including Block and Griffin, denied the Motion to Disqualify and decided most, but not all, of the merits of the case.

In *United Nurses & Allied Professionals*, 359 NLRB No. 42 (Dec.12, 2012), that four-Member Board addressed two issues. The first was whether Respondent Union was required to provide objectors under *Communications Workers v. Beck*, 487 U.S. 735 (1988), of which Ms. Geary is one, with an actual copy of the independent audit and

auditor's verification performed on the Union's financial breakdown of chargeable and non-chargeable expenses. The recess-appointee Board, with confirmed Member Hayes dissenting, ruled that Union had no obligation to provide such verification of the audit and dismissed that portion of the Complaint. 359 NLRB No. 42, slip op. at 3-4.

The second issue the recess-appointee Board addressed was the chargeability of union lobbying to nonmember *Beck* objectors. On this issue, the recess-appointee Board, with Member Hayes again dissenting, adopted a new standard of chargeability, namely, "that lobbying expenses are chargeable to objectors if they are germane to collective bargaining, contract administration, or grievance adjustment." *Id.* at 6. The majority, including challenged Members Block and Griffin, also held that "extra-unit lobbying expenses may be charged . . . if they were incurred for services that are otherwise chargeable and that may ultimately inure to the benefit of employees in the objector's bargaining union because of the union's participation in an expense-pooling arrangement." *Id.* at 8-9.

However, the recess-appointee Board did not issue a final order determining whether the specific lobbying activities involved in the case are chargeable. Rather, it "propose[d] . . . that, "as to certain kinds of lobbying expenses, . . . a rebuttable presumption of germaneness is warranted." *Id.* at 9. The recess-appointee Board then solicited briefs from "all interested parties . . . regarding the question of how the Board should define and apply the germaneness standard in the context of lobbying activities."

Id.. This round of supplemental briefing, including responsive briefs of the parties, was completed on March 5, 2013.

The posture of Ms. Geary's case is unique. The recess-appointee Board dismissed the audit verification issue but severed and retained jurisdiction over the issue of the chargeability of lobbying to *Beck* objectors. *Id.* at 9-10. The Board has yet to issue a final decision on the chargeability of lobbying. Consequently, a petition for review by a U.S. Court of Appeals under Section 10(f) of the Act has not been and is not now ripe. Indeed, to prevent the invalid recess-appointee Board from ruling further on the chargeability issue, Ms. Geary petitioned for a Writ of Prohibition or Mandamus from the D.C. Circuit, which ordered the Board to respond to the Petition. Geary thus took every legal action possible to prevent the recess-appointee Board from issuing further rulings in her case, unless and until the Supreme Court decides the validity of the recess appointments.

This complicated procedural posture changed significantly when the U.S. Senate confirmed a full slate of Board Members on July 30, 2013, thereby indisputably restoring the quorum of Members required by *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *Noel Canning*.

Given this history and the unique posture of this bifurcated case, Ms. Geary now moves the new Board to void the previous Board's dismissal of part of her case on the

¹ D.C. Cir. Case No. 13-1029. With the confirmation of a lawful Board, the Petition for a Writ of Mandamus or Prohibition became moot. The Petition was voluntarily dismissed on August 9, 2013.

audit verification issue, void the disputed Board's issuance of its new standard for the chargeability of lobbying, and consider *ab initio* all of her exceptions to the ALJ's decision. This Motion is not a request for reconsideration, but rather a request for *consideration* of the exceptions and all the briefs, including those in support of and in response to the exceptions and those filed pursuant to the disputed Board's solicitation of briefs concerning "the germaneness standard in the context of lobbying activities," 359 NLRB No. 42, slip op. at 9.

This Motion should be granted because a *de novo* decision by a valid Board, untainted by the recess appointments issue, will promote administrative and judicial economy given the virtual certainty of an appeal from any decision in this case to a federal court of appeals. The issues decided by the case will have substantial, immediate, and nationwide impact on union policy and employee rights and it behooves the new Board to issue a unified and clear ruling without delay. Ms. Geary does not request further briefing on any of the issues presented, as the case is more than adequately briefed, especially in light of the supplemental briefing concluded in March 2013. Rather, she seeks a new and untainted decision on the entire case. To do anything else is to consign this case and the Board to many more years of piecemeal litigation, given the likelihood of a U.S. Court of Appeals granting a petition for review and vacating the underlying decision of the recess-appointee Board should the Supreme Court uphold the D.C. Circuit's ruling in *Noel Canning* that the disputed recess appointments are invalid

and that the recess-appointee Board lacked a valid quorum.

III. Conclusion

In light of the extraordinary recent history of the Board, the challenged Board's handling of the instant case, as well as the significance of the issues raised, Charging Party Geary urges the newly-constituted Board to vacate *United Nurses & Allied Professionals (Kent Hospital)*, 359 NLRB No. 42 (Dec. 12, 2012), and to consider her exceptions and the entire record in this case *ab initio*, in the interest of judicial economy and clarity of the law.

Dated this 13th day of August, 2013.

Respectfully submitted,

/s/

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Attorney for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2013, a copy of this Response was electronically filed to the Lester Heltzer, National Labor Relations Board, Executive Secretary. In addition, a copy was sent via U.S. mail, first-class postage pre-paid, as well as email, to the following:

Christopher Callaci United Nurses & Allied Professionals 375 Branch Avenue Providence, RI 02904 ccallaci@unap.org

and

Jonathan Kreisberg, Regional Director Don Firenze, Attorney (don.firenze@nlrb.gov) National Labor Relations Board, Region 1 10 Causeway Street, 6th Floor Boston, MA 02222

_____/s/___

Matthew C. Muggeridge

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